FEB 2 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. 659.

TAFT MOODY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis 3, Tennessee,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Statement of jurisdiction	2
Opinions of the Court	2
Judgment of Court of Appeals	2
Questions presented	3
Statement	4
Reasons why the writ should be granted	8
Prayer	11
Appendix	13

Cases Cited.

Billingsley v. U. S., 8th Cir., 16 F. 2d 754, 755	9
Commissioner of Internal Revenue v. Guminski, 5th Cir., 198 F. 2d 265	10
Commissioner of Internal Revenue v. Weisman, 1st Cir., 197 F. 2d 221	10
Dierkes v. U. S., 6th Cir., 274 F. 75, 79	8
Filiatreau v. U. S., 6th Cir., 14 F. 2d 659	9
Floren v. U. S., 8th Cir., 186 F. 961	8
Hofferbert v. Anderson Oldsmobile, 4th Cir., 197 F. 2d 504	10
Holland v. U. S., 348 U. S. 121	9
Hovey v. Elliott, 167 U. S. 409	8
Jones v. Herber, 10th Cir., 198 F. 2d 544, 545	10
McMullen v. U. S. (D. C. Court of Appeals) 96 F. 2d 574	9
Missouri ex rel. v. North, 271 U. S. 40	8

O'Neill v. U. S., 19 F. 2d 322 (C. C. A. 8)..... 8

Peck v. U. S., 7th Cir., 65 F. 2d 59..... 9
Pennoyer v. Neff, 95 U. S. 714..... 8
Potter v. U. S., 155 U. S. 438..... 7

Smith v. U. S., 348 U. S. 147..... 9
Snyder v. Mass., 291 U. S. 97, 105, 78 L. Ed. 674, 678.. 8

U. S. v. Allied Chemical & Dye Corp., 42 F. Supp. 425. 8
U. S. v. Calderon, 348 U. S. 160..... 9
U. S. v. Greve, 12 F. Supp. 372..... 8
U. S. v. Halsey, Stuart & Co., 4 F. Supp. 662..... 8

Van Dam v. U. S., 6th Cir., 23 F. 2d 235, 237..... 9

Statutes Cited.

Federal Rules of Criminal Procedure, Rule 37 (C).... 2
26 U. S. C., Section 145 (b)..... 4
28 U. S. C., Section 1254 (1).....2, 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. .....

TAFT MOODY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Taft Moody, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered January 6, 1956.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), Rules 21-33, of this Court and Rule 37 (C) of the Federal Rules of Criminal Procedure.

OPINIONS OF THE COURT.

No Opinion was filed in either the District Court or the Court of Appeals.

JUDGMENT OF COURT OF APPEALS.

The judgment of the Court of Appeals, entered January 6, 1956, is as follows:

> "Before Simons, Chief Judge; McAllister and Miller, Circuit Judges.
>
> "The above case coming on to be heard upon the transcript of record, the briefs of the parties, and the argument of counsel in open court, it appears that the verdict of the jury was sustained by the evidence. An examination of the record convinces us that there was no error on the part of the trial court in overruling appellant's motion for judgment of acquittal at the conclusion of the government's testimony, which was renewed at the close of all of the evidence; and that the trial court, further, committed no reversible error in denying appellant's motion for a bill of particulars, in refusing any of the appellant's proposed requests to charge, in the admission of evidence during the course of the trial, or in denying appellant's motion for a new trial.
>
> "In consideration of the foregoing, the judgment of the district court is affirmed."

A transcript of the record, as required by the rules of this Court, accompanies the petition.

QUESTIONS PRESENTED.

1. Whether the trial Court erred in overruling a motion for a bill of particulars when his action in so doing was based in part on an affidavit of an Internal Revenue Agent, setting out information verbally given the defendant several years before and the denial of the motion resulted in prejudicial surprise to petitioner at the trial.

2. Whether the Court erred in permitting the introduction in evidence by the Government of two financial statements purporting to have been signed by the defendant, the first dated August 22, 1942, and the second dated February 1, 1946, for the purpose of showing an increase in the net worth of petitioner, neither of these statements corresponding to the taxable period involved nor showing the expenditures during that period nor the cost of assets acquired by petitioner during the period involved.

3. Whether the Court erred in refusing to instruct the jury that before they could consider such financial statements as showing an increase in net worth it must appear therefrom what was the cost of the materials and assets shown on these statements, and that it is the expenditures between the dates involved that control and an enhancement or increase in the value of property acquired by petitioner during the period covered by the statements is an immaterial consideration.

4. Whether the Court erred in refusing to instruct the jury directly and unequivocally that the fact that petitioner may have paid a price in excess of the ceiling price fixed for beer by the OPA or other Governmental agency would not deprive him of the right to charge the amount actually paid in computing his income tax but he would be entitled to deduct as a business expense the premium or brokerage in excess of the OPA price which he had to pay in order to obtain beer.

STATEMENT.

Petitioner was indicted on three counts for alleged violations of Section 145 (b) of the Internal Revenue Code; 26 U. S. C., Section 145 (b). He was acquitted on Counts I and II of the indictment and convicted on Count III. On a judgment of conviction he was sentenced to five years' imprisonment and fined $10,000.00 and costs. The indictment was returned to the Middle District of Tennessee, where the office of the Internal Revenue Collector is located. Thereafter an Order was entered, transferring the case from the Middle District of Tennessee to the Western District. The District Court ordered it retransferred to the Middle District. An appeal was taken from this order and thereafter dismissed. Subsequent to such dismissal, an application was made to the District Court for the Middle District at Nashville for a Bill of Particulars, and this motion was granted in part, and decisions on a part of the motion were reserved. That part of the motion granted recited that the income tax return was prepared and mailed from Memphis to the office of the Internal Revenue Collector in Nashville.

In the meantime, the Court of Appeals for the Sixth Circuit had rendered a decision sustaining the transfer under Rule 21 of an income tax fraud case from one District to another where an indictment alleged, or it was shown by the bill of particulars, that the offense was commenced in one District and consummated in another. When the case was again transferred to Memphis, the several grounds of the bill of particulars, taken under advisement, had not been passed upon by the District Court for the Middle District of Tennessee.

After the retransfer, the District Judge at Memphis denied the motion. The third count of the indictment reads as follows: (App. 5a-6a):

"That on or about the 15th day of January, 1946, in the Middle District of Tennessee, Nashville Division, Taft Moody, late of Memphis, Tennessee, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year of 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Tennessee, at Nashville, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $32,614.97 and that the amount of tax due and owing thereon was the sum of $14,874.71, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $54,146.93, upon which said net income he owed the United States of America an income tax of $30,414.61.

"In violation of Section 145 (b), Internal Revenue Code; 26 U. S. C., Section 145 (b)."

The third ground of the second motion for a Bill of Particulars, still under consideration when the case was transferred to Memphis for trial, reads as follows (App. 8a):

"This count alleges in substance that the net income as reported for the calendar year 1945 was $32,614.97 when the actual income for that year was $54,146.93, without showing the source of income, items of deduction, etc., and without showing whether the alleged fraud consisted of a failure to report the total income received or was the result of claiming deductions to which defendant was not entitled and without any showing of the basis on which the conclusion of the pleader was predicated, and without such information defendant cannot prepare his defense."

On the hearing of this motion the Government introduced in opposition an affidavit of H. A. Norris, Internal

Revenue Agent, which recited in substance that the information called for was furnished the defendant in a conference with him, an auditor, and his then attorney, Leon Catlett,, on August 11, 1949. This was an informal conference nearly five years before the trial of the case in which items covering a period of several years were discussed (App. 111a-113a).

When the tax matters were first called to the attention of petitioner, he employed an auditor and an attorney to make adjustments, if such were needed, and was then amply able to pay any tax that he might have owed the Government (App. 182a).

Count three charged that petitioner reported his income for the calendar year of 1945 at $32,614.97, whereas, he should have reported his net income for that year as $54,146.92, or a failure to report income in the sum of $21,531.94 (App. 5a-6a).

Petitioner engaged in business at both Memphis and Oak Ridge, making ice cream at both plants but he did not handle beer at Memphis but only at Oak Ridge.

After establishing a plant at Oak Ridge, leasing property for that operation from the Government, petitioner in order to obtain beer had to pay a premium of $0.25 a case over the OPA ceiling price. The amount of this premium or brokerage exceeded the alleged deficiency in income for the calendar year 1945 on which he was convicted and the alleged deficiency for the calendar year 1944 on which he was acquitted. If allowed credit for these payments, he would not have owed the Government anything for either 1944 or 1945 (App. 151a, 165a).

All receipts from the sale of beer were reported (App. 198a), but the brokerage or kick-back of $0.25 a case paid by petitioner in order to purchase beer was not shown on

his books, the reason being that periodic examinations were made of these books and records by representatives of the OPA to determine whether its regulations had been violated (App. 236a).

The beer was sold at the OPA price and the brokerage paid to acquire the beer did not affect the price at which it was sold to the customers (App. 236a). The Internal Revenue Agent who testified for the Government stated that the books of petitioner correctly showed the gross receipts for the years 1944 and 1945, these being the years for which beer was handled at Oak Ridge (App. 103a), but there was no showing of the expenditure for brokerage payments and these were not included in the cost of beer purchased (App. 116a, 117a).

A large volume of beer was handled at the Oak Ridge plant. The amount so handled in 1945 being 120,000 cases (App. 235a).

It was the theory of the prosecution that if any "Payments were made for over-ceiling purchases of beer they would have to show on the books of the firm," and expressly so stated in the Government brief in the Court of Appeals (page 40).* Apparently the Court of Appeals adopted this theory. Otherwise petitioner would not have been indebted to the Government for any tax in 1945, the year for which he was convicted.

---

* If actuality, not speculation, is the criterion by which the rights of petitioner are to be determined, and regardless of the violation of some OPA regulations, he could not be convicted in this case unless there was a failure to pay the income tax for which he was due. It is quite elementary that an accused may not be convicted under a statute involving an intent to defraud on a mere matter of bookkeeping (*Potter v. U. S.*, 155 U. S. 438).

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. The Court could have known and should have known that the refusal of the Bill of Particulars in the instant case would result in prejudicial surprise to petitioner. Petitioner had been out of business two years when called upon for an explanation of such items as the revenue agent saw fit to call to his attention. A conference was arranged for August 11, 1949. The heat was intense and the conference lasted four hours. It covered the years 1942-1947, inclusive. These included the indictment years, 1943, 1944, and 1945 (App. 43a). Prior to and at the time of this conference, petitioner was able to employ counsel, auditors, and to pay any tax that he owed the Government (App. 182a, 285a). This was conceded by the Government. But the amount of the Government claim was not then disclosed to petitioner nor disclosed to him at any time prior to the trial. So far as he was concerned, the trial was a dark lantern performance.

The Supreme Court has consistently held that notice and reasonable opportunity to prepare the defense are essential elements of due process. **Snyder v. Mass.**, 291 U. S. 97, 105, 78 L. Ed. 674, 678; **Hovey v. Elliott**, 167 U. S. 409; **Missouri ex rel. v. North**, 271 U. S. 40; **Pennoyer v. Neff**, 95 U. S. 714.

It is not the office of a Bill of Particulars to make a bad indictment good, but it may make the charges sufficiently definite to inform the accused with reasonable certainty what he is required to meet and thus satisfy essential requirements of due process. **Floren v. U. S.**, 8th Cir., 186 F. 961; **Dierkes v. U. S.**, 6th Cir., 274 F. 75, 79; **O'Neill v. U. S.**, 19 F. 2d 322 (C. C. A. 8); **U. S. v. Halsey, Stuart & Co.**, 4 F. Supp. 662; **U. S. v. Greve**, 12 F. Supp. 372; **U. S. v. Allied Chemical & Dye Corp.**, 42 F. Supp. 425.

Granting or refusing a Bill of Particulars ordinarily rests in the sound discretion of the trial court, but the cir-

cumstances of the case may be such that a refusal to grant it will constitute reversible error. **Billingsley v. U. S.**, 8th Cir., 16 F. 2d 754, 755; **McMullen v. U. S.** (D. C. Court of Appeals), 96 F. 2d 574; **Filiatreau v. U. S.**, 6th Cir., 14 F. 2d 659; **Van Dam v. U. S.**, 6th Cir., 23 F. 2d 235, 237; **Peck v. U. S.**, 7th Cir., 65 F. 2d 59. This is such a case.

2. The Court erred in permitting the introduction in evidence of two financial statements, the first dated August 26, 1942, and the second dated March 14, 1946 (App. 14a, 19a), and in refusing to instruct the jury that before these could be considered as showing an increase in net worth it should be made to appear what was the cost of the materials and assets shown on these statements and that an enhancement in the value of property acquired by petitioner during the period covered by the statements was an immaterial consideration (App. 315a). The error involved in the admission of these statements and the prejudicial refusal of the trial judge to give a proper instruction as to the net worth theory runs foul of the rules pronounced by this Court in **Holland v. U. S.**, 348 U. S. 121[1]; **U. S. v. Calderon**, 348 U. S. 160; **Smith v. U. S.**, 348 U. S. 147.

The principle pronounced in the Holland case should not be restricted to cases where the Government relies on the net worth theory alone but where it constitutes a substantial part of the evidence in behalf of the Government; the nature of that method, the assumptions on which it rests, and inferences available for and against the accused

[1] In the Holland case, this Court said:

"In income tax evasion prosecutions based on net worth method of proof, charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and inferences available both for and against the accused, and reviewing courts should bear constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

should be clearly stated to the jury. This was not done in the instant case. We do not insist that the net worth theory requires the same degree of proof where it is corroborated by independent evidence as would be required if it was the sole basis on which a conviction was sought, but in either instance the basic principles of the theory should be stated to the jury and the evidence should be such as would permit an allocation of the increase based on net worth to the year or years for which a conviction is had where the increase extended over a period of years.

3. The Court should have instructed the jury in direct and unequivocal language that the fact that petitioner may have paid a premium or brokerage above the OPA ceiling price in the purchase of beer did not deprive him of the right to charge the amount actually paid in computing his income tax. A special request strictly applicable to the undisputed evidence on this point was duly presented and refused by the Court (App. 316a-317a). This refusal was error.

Jones v. Herber, 10th Cir., 198 F. 2d 544, 545;

Hofferbert v. Anderson Oldsmobile, 4th Cir., 197 F. 2d 504;

Commissioner of Internal Revenue v. Weisman, 1st Cir., 197 F. 2d 221;

Commissioner of Internal Revenue v. Guminski, 5th Cir., 198 F. 2d 265.

This is the instruction actually given by the Court on that point:

> "The Court instructs you that black-market over-ceiling payments for sugar, beer or any other items mentioned in this trial are deductible as costs of goods sold only if the funds used to make these payments are found to have been properly included in receipts and reported as such on his tax return or received from a non-taxable source. Otherwise, the

overceiling payments and the withheld receipts used for this purpose cancel each other for tax purposes."

There was not a scintilla of evidence that justified the statement concerning "withheld receipts". On the contrary, the evidence for both the Government and petitioner showed that full report was made of all receipts of sale, whether of beer or otherwise (App. ...), and this charge was to say the least confusing and deprived petitioner of the full benefit of the rule under consideration.

4. Petitioner was denied a fair and impartial trial. The extremes to which the Government went in preventing petitioner from obtaining a Bill of Particulars concerning transactions that happened from five to twelve years before the trial; the loose method followed by the revenue agents in handling and obtaining petitioner's books and records, some of these having been picked up from the floor of a warehouse where petitioner had formerly conducted a business at Oak Ridge (App. 138a), and the fact that one of the books used at that plant had been lost, when considered in connection with the unfair use made of Exhibit 6 during the cross-examination of the 70-year-old bookkeeper, Brown, when considered collectively, showed to a mathematical certainty the violation of fundamental Rules of fairness in the conduct of the prosecution in this case. The affidavit of this bookkeeper filed as Exhibit 3 to the motion for a new trial, concerning the use of Government's Exhibit 6 to his cross-examination, is set out in the Appendix to this petition.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this court for its review and determination on the

day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, Taft Moody, Appellant, v. The United States of America, Appellee, No. 12,370, to the end that said case may be reviewed and determined by this court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this honorable court, and that petitioners may have such other and further relief in the premises as to this honorable court may seem right and proper.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis 3, Tennessee,
Counsel for Petitioner.

APPENDIX.

The affidavit of J. P. Brown, filed as Exhibit 3 to the Motion for a New Trial, relating to Government Exhibit 6 to the cross-examination of that witness, reads as follows:

"Affidavit.

"I, J. P. Brown, hereinafter referred to as affiant, depose and state as follows, to-wit:

"Affiant was bookkeeper for Taft Moody and testified in his behalf in the trial. In reference to the surprise document which Assistant District Attorney Vaden handed me near the conclusion of my cross-examination, this was simply a memorandum which I made up for Mr. Moody in July, 1945. It was never a part of his records but a memorandum only, and must have been extracted from the files at Oak Ridge. It was made up in July and showed approximate income equal to that for the entire year. Japan surrendered in August of that year and the Army Camps in and around Memphis were disbanded almost immediately, leaving the Memphis plant to operate at a serious loss for the remainder of the year. At Camden, the Government immediately abandoned the rocket plant, leaving Mr. Moody with an expensive ice cream plant on his hands which he had built at that point in anticipation of serving the rocket plant. This entailed a serious loss. By the end of the year, the figures were entirely different from what were indicated in July. The figures also do not include a dollar of the kickback on beer, which amounted to approximately $30,000 in 1945. Our income as reported for that year was substantially correct. Had this exhibit been furnished Mr. Moody in advance of the trial I would

have been able to verify the statements made in this affidavit, but coming at the close of my cross-examination, I was unable to relate these figures to the income tax return for that year. The effect of the close of the year on Mr. Moody's business did not then occur to me."

Exhibit 3.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Demetree v. *United States*, 207 F. 2d 892	7
Goldbaum v. *United States*, 222 F. 2d 360, certiorari dismissed, 350 U.S. 801	8
Holland v. *United States*, 348 U.S. 121	8
Maxfield v. *United States*, 152 F. 2d 593	7
Remmer v. *United States*, 205 F. 2d 277, judgment vacated and remanded, 347 U.S. 227	7
Rose v. *United States*, 128 F. 2d 622, certiorari denied, 317 U.S. 651	7
United States v. *Burdick*, 221 F. 2d 932, certiorari denied, 350 U.S. 831	8
United States v. *Caserta*, 199 F. 2d 905	7
United States v. *Skidmore*, 123 F. 2d 604, certiorari denied, 315 U.S. 800	7

Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U.S.C. 1952 ed., Sec. 145)	2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 659

TAFT MOODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the District Court nor the Court of Appeals wrote an opinion.

JURISDICTION

The judgment of the Court of Appeals (Pet. 2) was entered on January 6, 1956. The petition for a writ of certiorari was filed on February 2, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion for the trial court to deny petitioner's motion for a bill of particulars.

2. Whether the trial court erred in admitting into evidence certain financial statements signed by petitioner.

3. Whether the trial court erred in refusing to instruct the jury that it must consider the assets listed on the financial statements signed by petitioner on a cost basis rather than an appreciated value basis.

4. Whether the court erred in refusing to grant a requested instruction, relating to a defense contention, in the language proposed by petitioner.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon

conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 145.)

* * * * *

STATEMENT

On January 11, 1952, a three count indictment was filed against petitioner in the United States District Court for the Middle District of Tennessee, charging him with wilful attempts to evade his income taxes for 1943, 1944 and 1945, in violation of Section 145(b) of the Internal Revenue Code of 1939, by filing fraudulent tax returns. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 4a-6a):[1]

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1943)	$15,736.57 (Loss)	$ -0-	$82,040.86	$52,149.53
Count II (1944)	13,129.49	3,689.57	25,991.57	10,614.78
Count III (1945)	32,614.97	14,874.71	54,146.93	30,414.61

Petitioner's first motion for a bill of particulars was apparently granted, at least in part (R. 11a)—though the bill is not contained in the record—and his second such motion was denied after the Government filed an affidavit of the investigating agent in which he stated that the in-

[1] The record consists of two printed volumes comprising the appendices to the briefs in the Court of Appeals. The appellant's appendix is numbered 1a through 322a; the Government's appendix, 1b through 133b.

formation called for by the bill of particulars had been furnished the petitioner and his representatives during the investigation into the petitioner's tax liabilities (R. 6a-11a, 111a-113a).

After a jury trial petitioner was acquitted on Counts I and II of the indictment and found guilty on Count III. On June 1, 1954, the court imposed a sentence of five years' imprisonment and a fine of $10,000 and costs. (R. 2a.) On January 6, 1956, the Court of Appeals, in a brief *per curiam* opinion, entered judgment affirming the conviction (Pet. 2).

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized briefly as follows:

In the year 1942, petitioner opened a small retail business in Memphis, Tennessee, called the All American Ice Cream Company where he manufactured and sold various ice cream products. Petitioner's business prospered primarily through sales in large volumes of ice cream products to various military installations. Petitioner also established a branch of his business near the Oak Ridge, Tennessee, atomic energy project where a dining room was operated and where petitioner sold large quantities of beer as well as his ice cream products. The entire business was operated as the petitioner's sole proprietorship. (R. 148a, 149a, 245a, 109b, 113b.)

Investigation of the petitioner's books and records by agents of the Treasury Department disclosed that numerous items of personal expense

were charged on the books of the All American Ice Cream Company as business expenses. At a conference attended by petitioner, his attorney, his auditor and the Government investigators in 1949, each such item was discussed, and petitioner admitted to the investigators that he had instructed his bookkeeper, J. P. Brown, to charge many personal items to business expense. (R. 84a-85a; 89b-90b.) During the year 1945 personal, nondeductible expenditures of petitioner totalling about $24,000 were charged to business expense accounts in the following total amounts: supplies, $12,641.33; salaries, $11,165.10; repairs and maintenance, $81.90; utilities, $25.00; and freight, $9.15. The true nature of these disbursements was shown to be as follows: life insurance, $9,487; clothing, $2,653.75; gifts and loans to relatives, $10,756; food, laundry, etc., $1,175.61. (R. 73a-76a, 80a-85a.)

Petitioner's defense, in addition to denials of wilfulness, was that he had made certain under-the-table currency payments in order to obtain beer for the Oak Ridge operation and that these payments (which were not reflected in the books or the returns) were sufficient to cancel out the unreported net income resulting from the improper deductions (R. 150a-151a, 161a, 165a, 199a-204a). Based on this defense petitioner requested the following special instruction (R. 316a-317a):

> At the request of the defendant, the Court further instructs the jury that the fact that

> the defendant Moody may have paid a price in excess of the ceiling price fixed for beer by the OPA, or other government agency, would not deprive him of the right to charge the amount actually paid in computing his income tax, but he would be entitled to deduct as a business expense the premium or brokerage which he was required to pay for the purchase of beer.

The instruction actually given by the court concerning this defense is as follows (R. 297a):

> The Court instructs you that black-market overceiling payments for sugar, beer or any other items mentioned in this trial are deductible as costs of goods sold only if the funds used to make these payments are found to have been properly included in receipts and reported as such on his tax return or received from a non-taxable source. Otherwise, the overceiling payments and the withheld receipts used for this purpose cancel each other for tax purposes.

ARGUMENT

1. Petitioner contends (Pet. 8-9) that he suffered "prejudicial surprise" at the trial by reason of the court's denial of his motion for a bill of particulars, but makes no attempt to explain how or why he was surprised. Petitioner and his representatives had been fully informed at a conference with the Treasury agent several years before the trial as to the nature of the Government's case and the items on which it relied

(*supra*, pp. 3-4, 5). At the trial, petitioner recalled this meeting in considerable detail (R. 154a-157a, 188a, 192a). The proof of unreported net income was taken from petitioner's own books, which were returned to him by the agents years before the trial and which were in the office of his attorney during the trial (R. 126a-130a, 144a-146a). Even if petitioner had not been as fully informed of the Government's case as he was, the denial of his motion for bill of particulars would not constitute error. *Remmer* v. *United States*, 205 F. 2d 277, 281-282 (C.A. 9th), judgment vacated and remanded on other grounds, 347 U. S. 227; *Demetree* v. *United States*, 207 F. 2d 892, 894-895 (C.A. 5th); *Rose* v. *United States*, 128 F. 2d 622, 624-625 (C.A. 10th), certiorari denied, 317 U. S. 651; *United States* v. *Skidmore*, 123 F. 2d 604, 607 (C.A. 7th), certiorari denied, 315 U. S. 800; *Maxfield* v. *United States*, 152 F. 2d 593, 596 (C.A. 9th); Cf. *United States* v. *Caserta*, 199 F. 2d 905, 910 (C.A. 3d).

2. Petitioner states (Pet. 9) that the trial court erred in admitting in evidence financial statements signed by petitioner (and furnished to his bank) showing his net worth as of August 26, 1942, and February 1, 1946. The statements were admitted on the theory that since petitioner's records for 1943 had been destroyed by fire it was necessary for the Government to reconstruct income for that year by circumstantial proof (R. 33a, 51a-69a, 81b-87b). Although the statements were used briefly in general corroboration of the Government's case for the three-year period (R. 65b-

69b), Counts II and III were submitted to the jury on the theory of specific overstated deductions (R. 297a), and the court expressly charged the jury that their consideration of the net worth evidence was to be limited to Count I, on which petitioner was acquitted (R. 301a-302a). Plainly, petitioner could not have been prejudiced by the admission of this evidence. Cf. *United States* v. *Burdick*, 221 F. 2d 932 (C.A. 3d), certiorari denied, 350 U. S. 831; *Goldbaum* v. *United States*, 222 F. 2d 360 (C.A. 9th), certiorari dismissed, 350 U. S. 801.

3. Petitioner objects (Pet. 9-10) to the trial court's refusal to give his Requested Instruction No. 2 (R. 315a-316a). This proposed instruction was not a correct statement of the law relating to net worth proof (*Holland* v. *United States*, 348 U. S. 121, 131-132, 139-140), nor was this a net worth case. The court instructed the jury fully and correctly, as a reading of the entire charge will disclose (R. 293a-312a). Petitioner implies that the second financial statement reflects the market value, rather than the cost, of some of his assets and therefore includes an element of unrealized—and hence non-taxable—gain. But there was no such showing at the trial (cf. R. 168a) nor is the disputed document reproduced in the record. Dispositive of the point is the fact, already mentioned, that the trial court specifically limited the jury's consideration of the net worth evidence to Count I of the indictment, on which petitioner was acquitted (R. 301a-302a).

4. Petitioner's final contention (Pet. 10-11) is that the trial court erred in refusing the instruction he requested with respect to alleged unclaimed black market currency payments made in order to obtain beer (*supra*, pp. 5-6) and in charging the jury that such payments are deductible only if the funds used to make them have been reported as income, or received from a non-taxable source (*supra*, p. 6). The record discloses a solid evidentiary basis for the distinction between the requested instruction and that actually given. Petitioner testified that he had paid "under-the-table" cash premiums totalling $52,500 in 1944 and 1945 to obtain beer; that this money came out of his business; that it was not shown on the books or tax returns because it was paid in violation of OPA regulations; but that all of the gross receipts from the sale of beer were recorded on the books (R. 150a-151a, 161a, 165a, 171a, 198a). Petitioner's books disclosed receipts from beer in 1945 of $298,937.96 and disbursements on account of beer of $292,772.18 (R. 143a). Petitioner's testimony raised the high probability that if the claimed 1945 payments had been made they must have been made from suppressed gross receipts. Otherwise the funds could not have become available without throwing the books hopelessly out of balance. Certainly they did not represent funds charged to petitioner's personal account, for his total withdrawals from the business in 1945 in the form of cash or checks payable to himself or to cash were $1,443.90. (R. 87a-88a.) The

trial judge recognized long before the close of the trial that the jury would have to decide not only whether petitioner had made the alleged black market payments but, if he did so, whether the funds so used represented unreported gross receipts (R. 102b-103b). The charge as finally given (*supra*, p. 6) simply told the jury, in impartial language, that the alleged payments were deductible for tax purposes unless the jury found that the funds so used represented unreported gross income, in which case the unreported income would cancel the unclaimed expenses. This was a correct statement of law, properly adapted to the facts of this case and could not have operated to petitioner's prejudice. The jury could not possibly have got the impression that the black market payments, if made, were not deductible by reason of their illegality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Acting Assistant Attorney General.
RICHARD B. BUHRMAN,
RONALD C. METEIVER,
Attorneys.

MARCH, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 377001 1045